92

Supreme Court, U.S.
FILED
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No. (1)

In the

Supreme Court of the United States

Stephen A. Eley

Petitioner

v.

Veterans Administration

Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eight Circuit

PETITION FOR WRIT OF CERTIORARI

Stephen Andrew Eley
2320 Colfax Ave. No. 25
Minneapolis MN. 55405
(612) 437-9591
(330) 743-4728

QUESTIONS PRESENTED FOR REVIEW.

1. (a) Did District Court err in granting summary judgment in defense favor? Although, it was brought to courts attention that Plaintiff did not receive Motion in Support for Summary Judgment. From defense attorney by U.S. Mail or any other delivery service.

2. Shouldn't the Eighth Circuit Court of Appeal have reversed the Judgment on Appeal because RULE (5a) (b) had been violated?

3. Isn't this a form of discrimination?

4. Was Plaintiff denied due process of law?

5. Did defense attorney violate the freedom of information act by denying plaintiff with a Memorandum Motion in support for summary judgment?

PARTIES TO PROCEEDING:

There is no publicly held company owning 10% or more of the corporation?s stock.

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114 F. 2d 946 (8 cir. 1940)

OPINIONS: UNPUBLISHED

JURISDICTION: September 20, 2007.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED, TEXT.

Defense Attorney deliberately attempted to mislead pro se plaintiff by servicing him with a **REPLY** (App 27). Without the advantage of a memorandum in support for summary judgment by him or the district court but, instead plaintiff was served with a **Certificate of Compliance.** Furthermore, **RULE 56. SUMMARY JUDGMENT** (c) Motion **and Proceeding Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. Defense attorney stated in **(MOTION HEARING)** (App 23). that he had been handed a one page response to June 3, 2005 **AMENDED NOTICE OF HEARING** (App 32). filed by the Department of Veterans, when in fact it was mailed by him with his signature and address on envelope. Se e (motio : hearing) page 20, 21. Defense couldn't show good cause nor, did he attempt to defend his actions for being in violation of rule (5) a, (5) d. New York Life Ins. Co. v. Brown, C. A. 5th 1996, 84 F .3d 137. ,. Sonis corporation v. Matsubhita Elec. Indus.

Co. D.C. Mass. 1974, 61 F.D.R.644., Bright v. Westmorland 341 F. Supp 2d 525. Express Magnuson v. Video Yesteryear C.A. 9th, 1996, 86 F3d 1424 Moreover, the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits showed that there is genuine issue of a material fact and that moving party was not entitled to a Summary Judgment, none of the defense's witness's statement was Gradable, even a strong possibility of collusion if subjected to scrutiny.

STATEMENT OF THE CASE

Mr. K. of the Minneapolis Medical Center has used his authority and influence to retaliate against petitioner. However, the witness's statements are in gross conflict each other because; most of the witnesses truly did not want to testify against the petition. Unfortunately their afraid of Mr. K. And his department heads.

REASONS FOR GRANTING THE PETITION RULE 10.

(b) A state court and a United States court of appeals has decided an important question of federal law that has not been, but, should be, settled by this court, has decided an important federal question in a way that conflict with relevant decisions of this court.

(c) A state court and a United States court of appeals has decided an important question of federal law that has not been, but, should be, settled by this court, has decided an important federal question in a way that conflict with relevant decisions of this court.

DISCUSSION

95 -30445 NEW YORK LIFE INSURANCE CO. v. ALVIN BROWN [14, 15] the district court had both subject matter and personal jurisdiction. Thus, our only inquiry is whether the district court acted in a manner so inconsistent with due process as to render the judgment void.

"[O]rdinarily all that due process requires in a civil case is a proper notice and service of process and a court of competent jurisdiction: procedural irregularities during the course of a civil case, even serious ones, will not subject the judgment to collateral attack". Fehlhaber v. Fehlhaber, 681 F. 2d 1015, 1027 (5th Cir.1982), cert. Denied, 464 U.S. 818,104 S. Ct.79, 78L. Ed 2d 90(1983).

Defendant failed to service Plaintiff with Motion in support for Summary Judgment, although Plaintiff was acting in a representative capacity and had met the prerequisite for service.

If a party no longer is represented by an attorney, service must be made on the party himself. SEC. v. Everest Management Corp., D.C.N.Y. 1980 87 F.D.R. 100n. If a party is no longer represented by an attorney, service must be made on the party himself. Fed Rules Civ. Proc. 59(a, b) 28 U.S.C.A. 1. Citing Wright & Miller. See: New York.

Life Insurance Co. v. Brown No. 95-30445, 95-30786

District court attempts to serve defendant's with copy of codefendant's summary judgment motion at address it knew or should have known was not defendant's last known address did not provide the notice of the motion to which defendant was entitle. Fed. Rules Civ. Proc 5, 5(b) 28, U.S.C.A. Also see: summary judgment hearing P# 11.

The judgment of the district court in both 95-30455 and 95-30786 are **VACATED** and **REMANDED** for further proceeding consistent with this opinion. P. 144.

SONUS CORPORATION, PLAINTIFF

v.

MATSUSHITA ELECTRIC INDUSTRIAL COMPANY, LTD, and Matsusbita Electric

Corporation of America, Defendant.

Civ. A. No. 68-977-3

United Stated District Court of Massachusetts

Jan. 18 1974, 61 F.R.D. 644

Ordered accordingly.

7. Federal Civil Procedure ....2842 Judgments is "void" within rule providing that on motion and on such terms as is just, court may relieve party from final judgment if judgment acted in a manner inconsistent with due process. Fed. Rule Civ. Proc. Rule 60(b)(4), 28 U.S.C.A. See opinions on page No.648 Failure to serve the motion upon Plaintiff constituted a violation of F.R. Civ.P. 5 and 55(b)(2)6. In Ken-Mar Airpark, Inc. v. TothAircraft&Accessories Co. 12 F.R.D. 399 (W.D.Mo. 1952), neither the judgment nor the files showed that defendant, who had been defaulted, had received notice in compliance with F.R. Civ.P. 55(b) (2). The court found "There was a failure of due Process and the Judgment was a nullity". See Wilver v. Fisher, 387 F. 2d 66 (10 Cir. 1967); Meeker v. Rizley, 324 F.2d 269 (10 Cir. 1963); Pittston Co. v. Reeves, 263 F. 2d 328 (7Cir. 1959); Rodriquez-Jimenez, 252 F.2d 290 (5Cir. 1958); Hicklin v. Edwards, 228 F. 2d 410 (8 Cir. 1955); Comm. Casualty Ins. Co. v. Whiteline Transfer & Stor-

age Co. Inc. 114 F.2d 946 (8 Cir. 1940).....

[11] The Court denies the motion to dismiss; but grant alternative relief requested. P. 650.

John Magnuson, d/b/a John Magnuson Associate,
Plaintiff-Appeliee-Cross Appellant

v

VIDEO YESTERYEAR, Defendant – Cross- Appellant.

Nos. 94-16787, 94-17019 and 95-15369

United Stated Court of Appeals,

Ninth Circuit. 1969. 88 F3d 1424, 1425, 10. **Federal Civil Procedure ~ 665, 2725.** The district court erred, however, in holding that service of the offer by federal.

CONCLUSION

Express was adequate. The handfuls of cases that have addressed the issue of service by Federal Express come almost entirely from district courts outside of this circuit, and they are not consistent. P. 1429, 1430, 1431.

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

STEPHEN A. ELEY, PETITONER

By .....

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2320 Colfax Ave. South #25
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(612) 437-9591

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
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www.ca8.uscourts.gov

September 20, 2007

Mr. Stephen A. Eley
2320 Colfax Avenue S.
Apt. 25
Minneapolis, MN 55408-0000

RE: 06-1842 Stephen A. Eley v. U.S Dept. of

Dear Sir:

The court today issued an opinion in this case. Judgment in accordance with the opinion was also issued today.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note

particularly that for petitions for rehearing and petitions rehearing en blanc must be received in the clerk's office within 45 days of the date of the entry of judgment. Counsel-filed petitions must be electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant, for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en blanc which is not received within the 45 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

paw

Enclosure(s)

cc: Mr. Lonnie Frank Bryan
Mr. Richard Sletten

District Court/Agency Case Number(s): CIV 03-6555 JRT/FLN

United States Court Of Appeals
FOR THE EIGHTH CURCUIT

No. 06-1842

Stephen A. Eley,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	District of Minnesota.
U.S. Department of Veterans Affairs,	*	
	*	
	*	[UNPUBLISHED]
Appellee	*	

Submitted: September 18, 2007
Filed: September 20, 2007

Before WOLLMAN, COLLOTON, and BENTON, Circuit Judges.

PER CURIAM.

Stephan A. Eley appeals the district court's[1] adverse grant of summary judgment in his employment-

discrimination action against his former employer, the Veterans Administration Medical Center. Having carefully reviewed the record and considered Eley's argument we find no basis for reversal. *See Jacob-Mua v. Veneman,* 289 F.3d 517, 520 (8th Cir. 2002) (de novo standard of review). Accordingly, we affirm. See 8th Cir. R. 47B.

[1]The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, adopting the proposed findings and recommendations of the honorable Franklin L. Noel, United States Magistrate Judge for the District of Minnesota

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

no: 06-1842

Stephen A. Eley,

Appellant

v.

U.S. Department of Veterans Affairs,

Appellee

Appeal from U.S. District Court for the
District of Minnesota – Minneapolis
(CIV 03-6555 JRT/FLN)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is here by ordered and adjusted that the judgment of the

district court in this cause is affirmed in accordance with the opinion of this Court.

September 20, 2007

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Stephen A. Eley,
Plaintiff,

Civil No. 03-6555 (JRT/FLN)

v.

ORDER ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

U.S. DEPARTMENT OF VETERAN AFFAIRS,

Defendant.

Stephen A. Eley, 2320 Colfax Avenue South, Number 25, Minneapolis, MN 55405, pro se plaintiff.

Lonnie F. Bryan, Assistant United States Attorney, **OFFICE OF THE UNITED STATES ATTORNEY,** 600 United States Courthouse, 300 South Forth Street, Minneapolis, MN 55415, for defendant.

Stephen A. Eley, brought this lawsuit against the U.S. Department of Veterans Affairs for employment discrimination, claiming that the Veterans Administration Medical Center ("VAMC") reassigned, suspended, and ultimately terminated his employment in retaliation for his filing of complaints with the Of-

fice of Resolution Management. Following a hearing, United States Magistrate Judge Franklin L. Noel recommended granting defendant's Motion for Summary Judgment. This matter is now before the Court on Eley's objections to the report and recommendation. The Court conducted a *de novo* review of plaintiffs objections pursuant to 28 U.S.C. § 636(B)(1)(C) and D. Minn. LR 72.2(b), and for the reasons set forth below, overrules plaintiffs objections and adopts the report and recommendation.

BACKGROUND

Eley was employed as a janitor in the radiology department at the VAMC until his termination in 2002. In June 2001, Eley initiated a friendship with Kathryn Schoonover who worked as a medical clerk in the radiology department. Eley brought Schoonover gifts and made other advances toward her in the following months. Schoonover reported Eley's behavior to her supervisor in December 2001. She reported the persistent behavior to Eley's supervisor, Lucious Kearse, on June 21, 2002. On June 25, 2002, she filed a sexual harassment claim with the VAMC Equal Employment Opportunity ("EEO") manager. On June 27, 2002, she received a temporary restraining order against Eley.

The VAMC reassigned Eley to a different department on June 25, 2002, and he was told not to contact Schoonover during the investigation of her harassment

claim. On June 27, 2002, Eley contacted the Office of Resolution Management claiming that his reassignment constituted harassment. He additionally alleged that the reassignment was retaliation for his prior EEO activity stemming from his lack of promotion.

After an informal investigation of Schoonover's harassment claim, VAMC director Stephen Kleinglass determined that the Administrative Investigation Board ("AIB") should convene to formally investigate the matter. Eley was required to appear before the AIB on August 14, 2002, but he refused to attend. His refusal, and his allegedly disrespectful behavior towards his supervisor, resulted in a three-day suspension, proposed on August 22, 2002. Eley was issued written notice of another AIB meeting, which indicated that he would face disciplinary or adverse action if he did not appear. Eley never attended an AIB meeting.

The AIB ultimately concluded that Eley sexually harassed Schoonover, failed to follow supervisor instructions not to contact her, and violated VAMC policy and supervisory orders when he failed to appear before the AIB. The AIB recommended that strong disciplinary action be taken against Eley.

On September 30, 2002, Eley received a letter of "proposed removal." The letter charged that Eley had committed five workplace infractions that justified his removal: (1) refusal to comply with an order to report to the AIB; (2) absence without leave; (3) rude and inappropriate behavior toward others; (4) failure to fol-

low an instruction from a supervisor; and (5) sexual harassment. The letter advised Eley of his rights to challenge the proposal and indicated that Kleinglass had not made a final decision on the proposed termination. Eley did not respond to the notice of proposed removal, and on October 18, 2002, Kleinglass sustained all five grounds for removal and terminated Eley's employment, effective November 1, 2002. Eley received the notice of removal on October 22, 2002. The notice advised him of the administrative remedies and appeals processes available to him.

The Office of Resolution Management consolidated Eley's multiple EEO and administrative claims on December 11, 2002. The EEO issued and Investigative Summary and Analysis Report, and on April 10, 2003, defendant issued a Final Agency Decision denying Eley relief on all claims. Eley appealed the decision to the Merit Systems Protection Board, and on August 22, 2003 and administrative law judge ruled that Eley had been discharged for good cause and that there were no circumstances mitigating the removal from service.

Eley brought this lawsuit on February 23, 2004 alleging that the VAMC reassigned, suspended, and terminated him in retaliation for his EEO activity in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 200E-3(a). Defendant moved for summary judgment, arguing Eley failed to state a prima facie case of retaliation. Alternatively, defendant argued the claims should be dismissed because Eley failed to demonstrate that

the VAMC's reasons for terminating Eley were pretextual. The Magistrate Judge recommended granting defendant's motion for summary judgment.

ANALYSIS

Plaintiff objects to the report and recommendation and argues that the VAMC's reasons for his reassignment, suspension, and termination are unfounded. As explained fully below, plaintiff has offered no evidence that the proffered reasons were a pretext for retaliation.

I. Applicable Legal Standards

A. Summary Judgement

Summary judgment is appropriate where the moving party establishes that there is no genuine issue of material fact and the moving party can demonstrate that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit, and a dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When considering a motion for summary judgment, a court must view all of the facts in the light most favorable to the non-moving party and give the non-moving party the benefit of any reasonable inferences that can be drawn from the facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

B. Retaliation Claim

A claim for retaliation is based on "an employer's actions taken to punish an employee who makes a claim of discrimination." *Haas v. Kelly Services, Inc.*, 409 F.3d 1030, 1036 (8th Cir. 2005). Title VII makes unlawful any employment practice that discriminates against an employee for opposing any practice made an unlawful employment practice by Title VII. 42 U.S.C. § 200e-3a.

Title VII retaliation claims are analyzed under the three-part burden shifting standard enunciated in *McDonnell Douglas*. 411 U.S. 792 (1973); see, e.g., Eliserio v. USW, Local 310, 398 F.3d 1071, 1078 (8th Cir. 2005). To establish a prima facie case of retaliation under Title VII, a plaintiff must show that: (1) he engaged in protected activity; (2) the employer took adverse employment action against him; and (3) the adverse action was causally linked to the protected activity. *Id.* Once a plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to offer a legitimate, nondiscriminatory reason for its actions. *Henthorn v. Capitol Commc'ns, Inc.*, 359 F.3d 1021, 1028 (8th Cir. 2004). If the employer can offer a legitimate, nondiscriminatory reason, the burden shifts back to the plaintiff to demonstrate that the proffered reason is a pretext. *Id.*

II. Defendant Demonstrates Legitimate Reasons to Reassign, Suspend, and Terminate Plaintiff's Employment

Defendant concedes that Eley has shown the first two elements of a prima facie case of retaliation. Eley engaged in protected activity under Title VII because he filed two complaints with the EEO, and Eley's reassignment, suspension, and termination constitute adverse employment actions. Defendant argues that Eley has not, however, demonstrated that the adverse employment actions were causally linked to his EEO activity.

The timing of a plaintiff's discharge in relation to his protected activity can sometimes establish causation for the purpose of establishing a prima facie case. *Sherman v. Runyon,* 235 F.3d 406,410 (8th Cir. 2000). Here, the alleged retaliation occurred shortly after Eley's most recent EEO activity. Viewing the facts in the light most favorable to the plaintiff, the Court assumes plaintiff has established a prima facie case of retaliation. Plaintiff's claim should nevertheless be dismissed because defendant has offered legitimate, non-retaliatory reasons to reassign, suspend, and terminate plaintiff's employment and plaintiff has offered no evidence that those reasons are pretextual.

A. Plaintiff's Reassignment

Eley was notified of his reassignment to a differ-

ent department on June 25, 2002. The reassignment stemmed from Schoonover's June 21, 2002 report to Kearse regarding Eley's alleged harassing behavior. During the EEO investigation, ORM investigator testified that Eley was reassigned pursuant to VAMC policy. The policy requires that the VAMC separate alleged victims of sexual harassment from the alleged harasser until the investigation of such a claim is finished. Additionally, the Temporary Restraining Order issued by the Hennepin County District Court prohibited Eley from having any contact with Schoonover. Under these circumstances, the Court finds that the VAMC reassigned Eley for legitimate, non-retaliatory reasons.

B. Plaintiff's Suspension

Eley was suspended for refusing to obey a direct order and for disrespectful conduct toward a supervisor. Eley refused to obey a direct order when Kearse instructed him to appear before the AIB on August 14, 2002. Eley told Kearse that he would not attend the meeting and that Kearse should not send him any more AIB notices. The VAMC requires all employees to participate in the AIB process. While Eley admits that he was required to participate in the process, he did not do so. Based on Eley's refusal to participate in the AIB process, the VAMC had a legitimate reason to suspend him.

C. Plaintiff's Termination

Eley received a notice of proposed removal on September 30, 2002. The VAMC set forth five infractions of workplace rules that justified his termination, including Eley's refusal to report to the AIB. Eley did not respond to the charges, despite the opportunity to do so, and Kleinglass subsequently sustained all five grounds for removal and terminated Eley on October 18, 2002.

Because defendant has shown legitimate, non-retaliatory reasons for the adverse employment actions taken against plaintiff, plaintiff bears the burden to prove by a preponderance of the evidence that the legitimate reasons offered were not defendant's true reasons for its actions.

III. Plaintiff Offers No Evidence Of Pretext

Eley has provided no evidence that defendant's proffered reasons for the adverse employment actions were pretextual. Eley argues that his supervisors conspired against him and forced Schoonover into making false accusations of sexual harassment against him, but Eley does not dispute that he refused to report to AIB.

Schoonover's claim of sexual harassment was investigated by the AIB, which was composed of three impartial members and a technical advisor. Eley alleges that the AIB was unfair, but offers no evidence

that the AIB investigation and findings were a pretext for retaliation. Because the VAMC acted reasonably and in good faith on the AIB's investigation and recommendation, whether it correctly concluded that Eley engaged in sexual harassment is immaterial. *See Euerle-Wehle v. United Parcel Service,* 181 F.3d 898, 900 (8th Cir. 1999) ("Whether UPS correctly concluded that Euerle-Wehle had committed serious violations of company policy that warranted her termination is not material, because UPS acted reasonably and in good faith in its investigation.").

Defendant offered legitimate, non-retaliatory reasons for taking adverse employment action against Eley. Eley has no evidence that the legitimate reasons offered were not defendant's true reasons for its actions. Accordingly, the Court concludes that plaintiff is entitled to no relief, and that defendant's motion for summary judgment must be granted.

CONCLUSION

Based on the foregoing, all the records, files, and proceedings herein, the Court OVERRULES plaintiff's objections (Docket No. 42) and ADOPTS the Magistrate Judge's Report and Recommendation (Docket No. 41). Accordingly, IT IS HERBY ORDERED that defendant's Motion for Summary Judgment (Docket 25) is GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: January 25, 2006
at Minneapolis, Minnesota

s/ John R. Tunheim
JOHN R. TURNHEIM
United States District Judge

Other Orders/ Judgments
0:03-cv-06555-JRT-FLN Eley v. Veterans Affairs Dept
CASE CLOSED on 01/25/06

U.S. District Court

District of Minnesota

Notice of Electrinc filing

The following transaction was enter on 1/26/2006 at 12:21 PM CST and filed on 1/26/2006
Case Name: Eley v. Veterans Affairs Dept.
Case Number: 0:03-cv-6555
Filer:
WARNING: CASE CLOSED on 01/25/2006
Document Number: 44

Docket Text:
JUDGMENT. (Attachments: # (1) Civil Notice – Appeal)(akl)

The following document(s) are associated with the transaction:
Document description: Main Document
Original filename: n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1051215216

[Date=1/26/2006] [FileNumber=845577-0]
[a38a1326358950ef20a1f74e14fffc52c5630083eb0a3
fed60e11723a379547dcel
ed6bf94225feefd8c0eca769ale9d4d82fcf82ca9162cfe
fa41e8df86de9]]
Document description: Civil Notice – appeal
Original filename: n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1051215216
[Date=1/26/2006] [FileNumber=845577-1]
[775a66a7732b4330e06a415833f92b6fef5096bf
7678fe870fab5b3296389c4e5beb
a055a7981865604472840505 7e9a1a52a58a3bd
2e5887e8686b80cd7f8ba]]

0:03-cv-6555 Notice will be electronically mailed to:

Lonnie F Bryan
lonnie.bryan@usdoj.gov,
muriel.holland@usdoj.gov;
usamnecf.civil@usdoj.gov

0;03-cv-6555 Notice will be delivered by other means to:

Stephen A Eley
2320 Colfax Ave S #25
Mpls, MN 55405

UNITED STATES DISTRICT COURT
District of Minnesota

Stephen A. Eley

JUDGMENT IN A CIVIL CASE

V.

Case Number: 03-6555 JRT/FLN

US Department of Veterans Affairs

❑ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

× **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUSTED THAT:
The Court **OVERRULES** plaintiff's objections and **ADOPTS** the Magistrate Judge's Report and Recommendation. Accordingly **IT IS HEREBY ORDERED** that the defendant's Motion for Summary Judgment is **GRANTED**.

Date January 26, 2006

RICHARD D. SLETTEN, CLERK

s/ Amy Linner

(By) Amy Linner, Deputy Clerk

UNITED STATES DISTRICT COURT
District of Minnesota

Richard D. Sletten, Clerk
Wendy S. Osterberg, Chief Deputy Clerk

700 Federal Building	202 U.S. Courthouse	417 Federal Building	212 U.S Courthouse
316 N. Robert St.	300 S. 4th St.	515 W. 1st St.	118 S. Mill St.
St. Paul, MN 55101	Mpls, MN 55415	Duluth, MN 55802	Fergus Falls, MN 56537
(651) 848-1100	(612) 664-5000	(218) 529-3500	(218) 739-5758

CIVIL NOTICE

The purpose of this notice is to summarize the time limits for filing with the District Court Clerk's Office a Notice of Appeal to the Eighth Circuit Court of Appeal from a final decision of the District Court in a civil case.

This is a summary only. For specific information on the limits for filing a Notice of Appeal, Review the applicable federal civil and appellate procedure rules and statutes.

Rule 4(a) of the Federal Rules of Appellate Procedure (Fed. R. P.) requires that a Notice of Appeal be filed within:

1. Thirty days (60 days if the United States is a party) after the date of "enter of the judgment

or order appealed from;" or

2. Thirty days (60 days if the United States is a party) after the date of entry of an order denying a timely motion a timely motion for new trial under Fed. R. P. 59; or

3. Thirty days (60 days if the United States is a party) after the date of entry of an order granting or denying a timely motion for judgment under Fed. R. Civ. P. 50 (b), to amend or make additional findings of fact under Fed. R. Civ. P. 52 (b), and/ or to alter ir mend the judgment under Fed. R. Civ. P. 59; or

4. Fourteen days after the date on which a previously timely Notice of Appeal was filed.

If a Notice of Appeal is not timely filed a party in a civil case can move the District Court pursuant to Fed. R. App. P. 4(a)(5) to extend the time for filing a Notice of Appeal. This motion must be filed no later than 30 days after the period for filing a Notice of Appeal expires. If the motion is filed after the period for filing a Notice of Appeal expires, the party bringing the motion must give the opposing parties notice of it. The District Court may grant the motion, but only if excusable neglect or good cause is shown for failing to timely Notice of Appeal.

United States District Court
District of Minnesota

STEPHEN A. ELEY	)	File No. CV-03-6555
	)	(JRT/FLN)
Plaintiff,	)	
	)	
vs.	)	Minneapolis, Minnesota
	)	July 22, 2005
U.S. DEPARTMENT	)	11:00 a.m.
AFFAIRS,	)	
	)	
Defendant.	)	

BEFORE THE HONORABLE FRANKLIN L. NOEL
UNITED STATES DISTRICT COURT
MAGISTRATE JUDGE

(MOTION HEARINGS)

APPEARANCES

For the Plaintiff: STEPHEN A. ELEY, PRO SE
2320 Colfax Avenue South, #25
Minneapolis, Minnesota 55405

For the Defendant: U.S. Attorney's Office
LONNIE BRYAN, ESQ.
600 U.S. Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415

Court Reporter: LORI A. SIMPSON, RMR-CRR
1005 U.S. Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415

COPY

Proceedings recorded by mechanical stenography; transcript produced by computer.

MR. ELEY: The defendant complained that my response was inadequate, but I filed it in time, the response, and I amended my response, which makes it adequate and on time. I am holding my amended response here. This is an amendment to my response that I - -

THE COURT: Let me just clear that up because the record is somewhat -- from my review of the file, and bear with me while I pull it up, there was no response. So when I got an amended response, I was somewhat confused, but let's see if we can't clarify that.

MR. ELEY: I think I might have my response here. It was filed. This is just a copy, but it was filed.

THE COURT: Bear with me one moment, Mr. Eley. Okay. It looks to me like there was a motion for summary judgment filed on May 31st together with a memorandum in support of the motion for summary judgment.

MR. ELEY: Actually - -

THE COURT: And there's an order referring that to me. Okay. Then there's a reply memo filed by the Department of Veterans Affairs on July 12th, and it was unclear to me what that was a reply to. Did you receive something, Mr. Bryan? I quess I have just been handed a one-page response to amended notice for a hearing. Did you - - I guess what was the reply memo replying to?

MR. BRYAN: It was entitled a reply because that's what the rule tells me to entitle it. Okay? And so I entitled it a reply. Okay? It was not in - - what I got from Mr. Eley was a notice of motion for summary judgment, okay, for today's hearing. I wrote Mr. Eley and told him, one, the time is inadequate. You need a memorandum. You need an order. You've got to follow the local rules. That's what I got before I filed the reply.

MR. ELEY: Your Honor, what I have here is an amended notice of hearing. And if he is telling me that I have to follow the local rules and file a memorandum, then I think he should be held to the same standard because this is what he sent me. This is not a motion to - - for summary judgment. It says, Amended notice of hearing.

THE COURT: Right. But you received, did you not, back in May or June, early June, the motion for summary judgment, the memorandum in support of the motion for summary judgment, and the exhibits, all that were filed on May 31st, correct?

MR. ELEY: Did I receive that? I received exhibits,

but I didn't receive the motion for summary judgment with his arguments. I received a box with the exhibits in it, but I didn't receive a motion for summary judgment, no. This is what I received from him and it states summary judgment in here.

THE COURT: That's okay. I am going to rely on...

UNITED STATES DISTRICT COURT
DISTRICT OF MINESOTA
Civil No. 03-6555 JRT/FLN

STEPHAN A. ELEY.	)	
	)	
Plantiff,	)	**REPLY**
	)	
v.	)	
	)	
DEPARTMENT OF VETERANS AFFAIRS,	)	
	)	
Defendant.	)	

In moving for summarry judgment. defendant served Plantiff, Stephan A. Eley (Eley), with a notice describing his obligation to serve and file a written responce. Docket # 32. Eley served a Notice of motion that he intended to as a responce. It did not, however, state grounds for such a motion, include a memorandum in support or otherwise make an argument to forestall a grant of Defendant's pending motion. *See* D.Minn. L.R. 7.1(b). Therefore, Defendant should hav judgment.

In Bennet V. Dr. Pepper/ Seven Up, 295 F.3d 805 (8th Cir. 2002), a *pro se* plantiff argued that a motion for summary judgment should not have been granted because he did not have a notice of the local rule re-

quiring a timely witten responce to the motion. Id., at 808. The Circuit Court noted the federal courts do not have an affirmative duty to provide such notice. Moreover, the Plantiff's

> "pro se status did not entitle him to disregard the Federal Rules of Civil Procedure," even without affirmative notice of the application of the rules to his case. Carman v. Treat, 7 F. 3d 1379, 1381 (8th Cir. 1993). The local rule requiring a responce to a summary judgment motion within twenty days was clear. *See Ceridian Corp. v. SCSC Corp.*, 212 F3d 398, 404 (8th Cir. 2000) (noting that where the language of a rule is unambiguous, a party's failure to follow it will not consitute excuseable neglect under rule 60 (b)).

Id. Furthermore, in Bennet, which like tis case, involved allgations of discrimination, the Plantiff also argued that he was entiled to releif because the District Court had rendered judgment onan incomplete record. The Eighth Circuit rejected the argument stating,

> " Like any other civil litigant, [the Plaintiff] was required to respond to [Defendant's] motion with specific factual support for his claims to avoid summary judgment." Beck, 253 F.3d at 333. The court was not bound, by rule or otherwise, to search the record for genuine issues of fact, when Bennet failed to bring such issues

to the attention of the court in a timely-filed responce to the motion for summary judgment. *See* Barge v. Anheuser-Busch, Inc., 87 F.3d 256, 260 (8th Cir. 1996) (recognizing that the district court has no "affirmitive obligation to plumb the record in order to find a genuine issue of nmaterial fact.")

Id., 808-09. Although Bennet arose in the context of a Rule 60(b) motion, its dission of the obligations of a *pro se* litigant is apt to the instant case. The Court need not search the record for factual disputes.

Here, despite notice of his obligation to timely respond in writing to Defendant's Motion for Summary judgment, Eley failed to do so. Based on the reasons and grounds submitted in Defendant's motion and supporting Exhibits and Memorandum, this Court should grant Defendant Judgment.

Dated this 12 day of July 2005.

THOMAS B. HEFFELFINGER
United States Attorney

s/ Lonnie F. Bryan
BY: LONNIE F. BRYAN
Assistant U.S. Attorney
Attorney ID Number 206635
600 U.S. Courthouse
300 S. Fourth Street
Minneapolis, MN 33415
(612) 664-5600

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
CIVIL NO. 03-6555 JRT/FLN

STEPHAN A. ELEY,	)	
	)	
Plantiff,	)	**CERTIFICATE OF**
	)	**COMPLIANCE**
v.	)	
	)	
DEPARTMENT OF	)	
VETERANS AFFAIRS,	)	
	)	
Defendant.	)	

The undersigned attorney for the United States certifies this memorandum complies with the type-volume limitations of D. Minn LR 7.1 (c) and the type limitiations of D. Minn LR 7.1 (e). The memorandum has 533 words of type, font size 13. The memorandum was prepared using WordPerfect 12, which oncludes all text, includeing headings, footnotes and quotations in the word count.

Dated: 7-12-05

THOMAS B. HEFFELFINGER
United States Attorney

s/ Lonnie F. Bryan
BY: LONNIE F. BRYAN
Assistant U.S. Attorney

Attorney I.D. No. 206635
600 U.S. Courthouse
300 s. Fourth Street
Minneapolis, Mn 55415
(612) 664-5600

CERTIFICATE OF SERVICE

STEPHAN A. ELEY,	)	
	)	
Plantiff,	)	
	)	Civil No. 03-6555
	)	JRT/FLN
v.	)	
	)	
DEPARTMENT OF	)	
VERTERANS AFFAIRS,	)	
	)	
Defendant.	)	

I hereby certify that an July 12, 2005, I caused the follwing documents:

REPLY, CERTIFICATE OF COMPLINCE and CERTIFICATE OF SERVICE

to be filed electronically with the Clerk of Court Through ECF. I further certify that I caused a copy of the foregoing documents and the notice of electronic

filing to be mailed by first class mail postage paid. to the following non-ECF participants:

Stephan Eley
2320 colfax Ave. So. #25
Minneapolis, MN 55405

Dated: July 12, 2005

s/ Muriel Holland
Muriel Holland

United States District Court
District of Minnesota
Civil NO. 03-6555 JRT/FLN

STEPHEN A. ELEY	)	
	)	
Plaintiff,	)	AMENDED
	)	NOTICE OF HEARING
V.	)	
	)	
U.S. DEPARTMENT	)	
AFFAIRS,	)	
	)	
Defendant.	)	

To: Plaintiff pro se, Stephen A. Eley
2320 Colfax Ave. So. #25, Minneapolis, MN 55405.

NOTICE IS HEREBY GIVEN that on Friday, July 22, 2005 at 11:00 a.m. or as soon thereafter as counsel may be heard, before the Honorable Magistrate Judge Franklin Noel, Courtroom 9w, U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota, the Defendant will move the Court for an order granting summary judgment pursuant to Fed. R. Civ. P. 56. You are invited to attend and be heard.

Please be advised that the Local Rules for the District of Minnesota require that you respond in writing to the pending Motion for Summary Judgment. At least twenty (20) days before the hearing, you must serve and file the response. To serve the response, mail a copy to:

Lonnie F. Bryan
U.S. Attorney's Office
600 U.S. Court House
300 South Fourth Street
Minneapolis, MN 55415

To file the response, mail a copy to:

Clerk of Court
United States District Court
202 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Failure to comply with this procedure may result in dismissal of your complaint and action without further notice or hearing.

Dated this _3_ day of June, 2005.

THOMAS B. HEFFELFINGER
United States Attorney

s/Lonnie F. Bryan

BY: LONNIE F. BRYAN
Assitstant U.S. Attorney
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Supreme Court, U.S.
FILED

No. (2) 071369 DEC 14 2007

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

Stephan A. Eley

Petitioner

v.

Veterans Administration

Respondent

SUPPLEMENTAL APPENDIX

Report and Recomendation

Stephan Andrew Eley

2320 Colfax Ave. No. 25

Minneapolis, MN 55405

(612) 437-9591

(330) 743-4728

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Stephan A. Eley Civil No. 03-6555 (JRT/FLN)

Plaintiff,

v. **REPORT AND RECOMMENDATION**

U.S. Department of Veterans Affairs,

Defendant

Stephan A. Eley, Pro Se Plaintiff.

Lonnie F. Bryan, Assistant United States Attorney, for Defendant.

THIS MATTER came before the undersigned United States Magistrate Judge on July 22, 2005, on defendant's Motion for Summary Judgement (#25). The matter was referred to the undersigned for Report and Recommendation pursuant to 28 U.S.C. § 636 and Local Rule 72.1. For the reasons that follow, the Court recommends Defendant's Motion be granted.

I. BACKGROUND

A. The Harassment Claim

Plaintiff Stephan A. Eley brings this employment discrimination suit, claiming that the Veterans Administration Medical Center ("VAMC") retaliated against him when they terminated his employment in 2002. The events that gave rise to Plaintiffs began in 2001, while he was employed as a janitor in the radiology department at the VAMC. (See Def. Ex. 1 at 897). In June 2001, Plaintiff initiated a friendship with Kathryn Schoonover, a medical clerk in the radiology department. (Id.). In the months that followed, Plaintiff brought Schoonover gifts of food and made other advances toward her. Schoonover never accepted the gifts. (Id.).

In December 2001, Schoonover reported Plaintiff's behavior to her supervisor, Marlys Hughes, and told her she planned to confront Plaintiff and to tell him to leave her alone. (Id. at 899). When Schoonover approached Plaintiff, he seemed receptive to her request to leave her alone and said he respected the request.

A couple of months later, however, Plaintiff began bringing Schoonover food and candy again. (Id. at 900). He also approached Schoonover to ask her out on a date. This type of behavior continued intermittently until May 15, 2002, when Schoonover reported the behavior to her new supervisor, Jane Keel, who contacted Plaintiff's supervisor, Lucious

Kearse. (Id. at 901). Two days later, a meeting took place between Schoonover, Kearse and Mary Shaw, the head of the radiology department. (Id.) At the conlusion of the meeting, Kearse told Schoonover that he would meet with Plaintiff that evening. (Id.). The next day, Plaintiff apologized to Schoonover and told her he would leave her alone. (Id. at 902).

Despite his reassurance, about a month later, Plaintiff followed Schoonover as she left work. (Id.). Ms. Schoonover noticed Plaintiff following her and decided to drive to a nearby movie rental store to phone the police. (Id. at 903). Plaintiff followed her into the store and approached her before she had an opportunity to contact the police. (Id.). Ms. Schoonover asked Plaintiff to leave the store and leave her alone (Id.).

After waiting for Plaintiff to leave, Ms. Schoonover returned home and contacted the police to seek a restraining order against Plaintiff. (Id.). Plaintiff later admitted following Schoonover that day. (Id. at 1680). The Hennepin County District Court issued a Temporary Restraining Order against Plaintiff on June 27, 2002. (Id. at 741-45). After a hearing, the court issued a Restraining Order against Plaintiff on September 11, 2002. (Id. at 746; 323).

On June 21, 2002, Schoonover reported to Plaintiff's supervisor Lou Kearse, that Plaintiff had followed her as she left work. (Id. at 816). Later that day, Plaintiff asked to be transferred out of the radiology department. (Id. at 817; 1681).

B. Investigation of the Harassment Claim and Plaintiff's Claim of Retaliation

On June 25, 2002, Schoonovere asked Petra Hartness, the VAMC Equal Employment Opportunity ("EEO") Manager, to start an investigation into Plaintiff's harassing behavior. (Id. at 321). On that day, Kearse informed Plaintiff that he was being reassigned to a different department. (Id. at 818). On June 28, 2002, Kearse presented Plaintiff with written notice of his reassignment, (a "written letter of counseling") which notified him that he was not allowed to enter the radiology department until the investgation regarding Schoonover's allegations had concluded (Id. at 815).

On June, 27, 2002, Plaintiff contacted the Office of Resolution Management ("ORM"), an autonomous office within the Veteran's Administration that process employee discrimination claims. (Id. at 53). He claimed that Kearse's reassignment of him constituted harassment, and that Kearse reassigned him in retaliation for his prior ORM activity. (Id. at 56).

On July 15, 2002 Hartness interviewed Plaintiff as part of the VAMC's informal investigation of Schoonover's claim of harassment. (Id. at 642;647). Based on the information gathered during the informal investigation, VAMC Director, Stephan Kleinglass, concluded that an Administrative Investgative Board ("AIB") should be convened to formally investigate the

claim. (Id. at 325-26).

Plaintiff was scheduled to appear before the AIB on August 9, 2002, but the appointment was cancelled. When Eugene House, VAMC's Environmental, Health & Safety Manager, telephoned Plaintiff at his home to tell him the appointment needed to be rescheduled, Plaintiff yelled: "How dare you call me at home! You are never to call me at home! Who do you think you are, calling me?" (Id. at 611-13; 1532).

On August 13, 2002, Kearse delivered two letters to Plaintiff, which instructed him to appear before the AIB on August 14, 2002, or face disciplinary or adverse action. Kearse described Plaintiff's reaction to the letters as "rude and disrespectful." Plaintiff approached Kearse and told him to tell Kleinglass and J.C. Hiller, the AIB technical advisor, that he would not attend the AIB meeting and that they should not send him any more messages. (Id. at 612-13; 1532).

On August 22, 2002, House issued Plaintiff a letter informing Plaintiff of a proposed three-day suspension for deliberate refusal to carry out a direct order, and for disrespectful conduct toward his supervisor. (Id. at 1532). The charge of disrespectful conduct arose from the events of August 9 and 13, when Plaintiff told House not to call him and told Kearse that he would not participate in the AIB proceedings. The charge of failing to follow an order arose from Plaintiff's failure to appear before the AIB on August 14, 2002. (Id.). Plaintiff later served the suspension on September 24-26, 20002. (Id. at 810; 964).

Also on August 22, 2002, Plaintiff filed a formal EEO Complaint of Employment Discrimination. (Id. at 88-93). He complained that he was subjected to harassment, discrimination, and reprisal for prior EEO activity when he received the letter of counseling on June 28, 2002, which advised him that allegations of sexual harassment had been filed against him and that he was forbidden to enter the radiology department. The ORM formally accepted the Complaint on September 26, 2002.

Plaintiff was absent from work on August 26-28, 2002. (Id. at 729; 1057). Prior to his absence, Kearse had denied his request for leave for those dates. On August 28, Plaintiff called and requested sick leave, but later admitted he was not sick on those dates. (Id. at 1057).

On August 27, 2002, Hiller sent Plaintiff a "Notivication of Interview" and a "Written Order" to Plaintiff by certified mail, which ordered Plaintiff to appear before the AIB on September 5, 2002. The letter stated that the AIB would propose Plaintiff's removal from employment if he did not comply with the order. (Id. at 1055; 1190-91). On August 29, Kearse hand delivered those documents to Plaintiff. (Id.). Plaintiff did not appear at the meeting on September 5, 2002. (Id. at 1055-56).

On September 5, 2002, the AIB issued its findings concerning Schoonover's harassment allegations. The AIB concluded that Plaintiff sexually

harassed Schoonover; that Plaintiff failed to follow supervisor instructions not to contact her; and that Plaintiff violated VAMC policy and supervisory orders when he failed to appear before the AIB. (Id. at 810-13). "Given the severity of 'Plaintiff's behavior, "his failure to comprehend the nature of his actions and his failure to appear before the board," the AIB recommended that strong disciplinary action be taken against Plaintiff. (Id. at 812).

On September 19, 2002, Kearse instructed Plaintiff to report to the Environmental Care Office to see Manager House. Plaintiff refused. (Id. at 806).

On September 30, 2002, Plaintiff received a letter of "proposed removal." (Id. at 798-802). The letter charged that Plaintiff had committed five work-place infractions which justified his removal: 1) refusal to comply with an order to report to the AIB; 2) absence without leave; 3) rude and inappropriate behavior toward others; 4) failure to follow an instruction from supervisor; and 5) sexual harassment. The letter noted that VAMC dirctor Kleinglass had not yet made the final decision on Plaintiff's termination, and advised Plaintiff of his rights to challenge the proposal. (Id. at 802).

Plaintiff did not respond to the notice of proposed removal. On October 18, 2002, Kleinglass, having considered all the evidence, sustained all five grounds for removal and terminated Plaintiff's employment, effective November 1, 2002. (Id. at 795-96). On October 22, 2002, Plaintiff received the notice of removal, which

advised him of the available administrative remedies and appeals available to him.

On December 11, 2002, the ORM consolidated Plaintiff's multiple EEO and administrative claims. (Id. at 26). On January 27, 2003, the EEO issued an Investigative Summary and Analysis Report, which summarized Plaintiff's claims that his June 2002 reassignment, the September 2002 suspension and the October removal constituted barassment. (Id. at 26-48). On April 10, 2003, the Department of Veterans Affairs issued a Final Agency Decision denying Plaintiff relief on all claims. (Id. at 1-18). Plaintiff timely appealed the decision to the Merit Systems Protection Board (MSPB). On August 22, 2003, an MSPB administrative law judge ruled that Plaintiff had been discharged for good cause and that there were no circumstances mitigating the removal from service. (Id. at 1054-1074).

On February 23, 2004, Plaintiff filed suit in this Court against the United States Department of Veterans Affairs, alleging that the VAMC reassigned, suspended and terminated him in retaliation for his prior EEO activity, in violation to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. Defendant moves for summary judgment, arguing that Plaintiff's claim should be dismissed because he fails to state a *prima facie* case of retaliation. In the alternative, Defendant argues the claims should be dismissed because Plaintiff fails to demonstrate that Defendant's non-retaliatory reasons for terminating him are pretextual.

II. LEGAL ANALYSIS

A. Summary Judgement Standard of Review

The Supreme Court has held that summary judgement is to be used as a tool to isolate and dispose of claims or defenses of claims or defenses that are either factually unsupported or based on undisputed facts. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-27 (1986). Therefore, summary judgement is appropriate when the moving party establishes that there is no genuine issue as to any material fact and the moving party is entitled to judgement as a matter of law. See Fed. R. Civ. P. 56(c); Celotex, 477 U.S. at 322-23. For these purposes, a disputed fact is "material" if it must inevitably be resolved and the resolution will determine the outcome of the case; while a dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When considering a motion for summary judgment, a court should construe all evidence in favor of the non-moving party. Id. at 255. Thus, summary judgment is appropriate when the court has viewed the facts and the inferences drawn from those facts, in a light most favorable to the non-moving party, and found no triable issue. See Southwall Technologies, Inc. v. Cardinal IG Co., 54 F.3d 1570,1575 (Fed. Cir. 1995).

B. McDonnell-Douglas

A claim for retaliation is based upon an employee who makes a claim of discrimination. Haas v. Kelly Services, Inc., 409 F. .3d 1030, 1036 (8th Cir. 2005). Title VII provides that "it shall be an unlawful employment practice for an employer to discriminate against any of his employees...because (the employee) has opposed any practice made unlawful by this subchapter." 42 U.S.C. § 200e-3a.

Title VII retaliation claims are analyzed under the three-part burden shifting analysis in McDonnell Douglas Corp. c. Green, 411 U.S. 792 (1973). See Erenberg v. Methodist Hosp., 357 F.3d 787, 793 (8th Cir. 2004); Griffith v. City of Des Moines, 387 F.3d 733 (8th Cir. 2004); Eliserio v. United Steel Workers of America Local 310, 398 F.3d 1071, 1078 (8th Cir. 2005). to establish a *prima facie* case of retaliation under Title VII, a plaintiff has the burden to show that: (1) he engaged in protected activity; (2) the employer took adverse employment action against him; and (3) that the adverse action was causally linked to the protected activity. See id.; Haas, 409 F.3d at 1036-37; Henthorn v. Capitol Communications, Inc., 359 F.3d 1021, 1028 (8th Cir. 2004). An adverse employment action is exhibited by a material employment disadvantage, such as change in salary, benefits or responsibilities. See LaCroix v. Sears, Roebuck & Co., 240 F.3d 688, 691 (8th Cir. 2001). If the plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the employer to offer a legitimate, nondiscriminatory reason for its actions. *See Henthorn*, 359 F.3d at 1028. If the employer satisfies that requirement, the burden

then shifts back to the plaintiff to demonstrate that the proffered reason is pretextual. See id.

A plaintiff cannot necessarily avoid summary judgment by simply establishing a *prima facie* case and showing that the employer's purported justification is false. Summary judgment may still be warranted if the evidence reveals some other non-retaliatory reason for the employer's action, or the plaintiff creates only weak factual issues concerning pretext and additional, uncontroverted evidence shows that there was no retaliation. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000). Plaintiff retains the ultimate burden of persuasion in showing retaliation throughout the analysis. Id. at 143.

Here, Defendant concedes that Plaintiff has demonstrated the first two elements of a *prima facie* case of retalitation. Defendant concedes that Plaintiff has established that he engaged in protected activity because he had filed two complaints with the EEO. See Def. Mem. p. 13.[1] Defendant also concedes that Plaintiff's reassignment, suspension and removal constitute adverse employment actions under Title VII. See id. Defendant argues, however, that Plaintiff's claim fails because he has not demonstrated that his reassignment, suspension and termination were causally linked to his prior EEO activity. See id. In the alternative, Defendant argues that Plaintiff's claim fails because the VAMC offered legitimate, non-retaliatory reasons for his termination and Plaintiff has not establlished that those reasons are pretextual. See id. pp. 20-30.

Assuming without deciding that Plaintiff has established a *prima facie* case of retaliation, the Court concludes that Plaintiff's claim should be dismissed because Defendant has offered legitimate, non-retaliatory reasons to terminate Plaintiff's employment and Plaintiff has offered no evidence that those reasons are pretextual.

1. The VAMC Had Legitimate Reasons to Reassign, Suspend and Terminate Plaintiff's Employment

Defendant contends that it is entitled to summary judgment because the VAMC proffered legitimate, non-retaliatory reasons for Plaintiff's reassignment, suspension and termination. The VAMC maintains that it would have terminated Plaintiff regardless of his EEO activity due to his insubordination and harassing behavior. Insubordination and violation of company policy are legitimate reasons for termination. See Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1135 (8th Cir. 1999); Miner v. Bi-State Dev. Agency, 943 F.2d 912, 913-14 (8th Cir. 1991). The Court finds that the VAMC has proffered legitimate reasons for Plaintiff's reassignment, suspension and termination.

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[1] Plaintiff filed an EEO complaint in February 2000, in connection to a charge of unexcused absence, and another complaint in 1996. See Def. Ex. 1 at 2.

a. Plaintiff's Reassignment

On June 25, 2002, Kearse notified Plaintiff that he was being reassigned to a different department and that he was forbidden from entering the radiology department. On June 28, 2002, Kearse provided Plaintiff written notice of his reassignment. On June 21, 2005, Schoonover had reported Plaintiff's harassing behahavior to Kearse. On that same day, Plaintiff asked to be transferred out of the radiology department. On June 25, Schoonover requested the VAMC to formally investigate Plaintiff's harassing behavior.

ORM Investigator Harness testified during the EEO investigation that Plaintiff was reassigned pursuant to VAMC policy, which requires the VAMC to separate victims of sexual harassment from the alleged harasser while the claim of harassment is being investigated. See Def. Ex. 1 at 324. Also, Hennepin County District Court had issued a Temporary Restraining Order on June 27, 2002, which prohibited Plaintiff from having any contact with Schoonover, who worked in the radiology department. The Court finds that the VAMC reassigned Plaintiff for legitimate, non-retaliatory reasons.

b. Plaintiff's Suspension

On September 19, 2002, manager House suspended Plaintiff for refusal to obey a direct order, and for disrespectful conduct toward a supervisor. On August 13, 2002, Kearse had instructed Plaintiff by letter to appear before AIB on August 14, 2002.

Kearse described Plaintiff's reaction to the letter as "rude and disrespectful." He told Kearse that he would not attend the AIB meeting and that Kearse should not send him any more AIB notices. Plaintiff also acted disrespectfully to House when House called him on August 9 to report that the AIB meeting had been rescheduled. Plaintiff screamed at House and told him never to call again.

The VAMC had legitimate reason to suspend Plaintiff for his disrespectful conduct and his refusal to attend the AIB meeting. The VAMC requires all employees to participate in the AIB process, and Plaintiff was notified that if he failed to participate he would be removed from employment. Plaintiff admits he was required to participate in the AIB proceedings. See Eley Depo. At 88-89. Plaintiff's refusal to participate in the process violated VAMC policy, and the VAMC had legitimate reason to suspend Plaintiff for his insubordination. See Kiel, 1169 F.d at 1135.

C. Plantiff's Termination

On September 30, 2002, Plaintiff received a notice of proposed removal from employment. In the notice, the VAMC set forth five infractions of work-place rules that justified his termination: 1) refusal to comply with an order to report to the AIB; 2) absence without leave; 3) rude and inappropriate behavior toward supervisors; 4) failure to follow supervisory instruction; and 5) sexual harassment. Despite an opportunity to respond to the charges, Plaintiff did not reply to the notice of proposed removal. On

October 18, 2002, after considering all the evidence, VAMC director Kleinglass sustained all five grounds for removal and terminated Plaintiff.

As discussed above, the VAMC had legitimate reason to terminate Plaintiff for his refusal to participate in the AIB process. After his notice of suspension in August 2002, Plaintiff refused a subsequent order to attend a rescheduled AIB meeting on September 5.

The record also shows that the VAMC had legitimate reason to terminate Plaintiff for the other reasons listed in the notice of removal. Plaintiff was absent from work on August 26 and 27, 2002, even though his request for leave on those days had been denied. Therefore is absence without leave was properly considered as grounds for termination.

The VAMC had documented Plaintiff's disrespectful conduct towards supervisors Kearse, Anklam and House on three different occasions, and also that Plaintiff disobeyed Kearse's instruction to report to House's office on September 19. Thus, the VAMC had legitimate reason to terminate Plaintiff for disrespectful conduct and insubordination.

Lastly, the Court finds that the VAMC had legitimate reason to terminate Plaintiff for sexual harassment. The AIB found that Plaintiff sexually harassed Schoonover and that he continually ignored his supervisors; instructions not to contact her. The AIB recommended, "given the severity" of Plaintiff's behavior, that strong disciplinary action be taken against him. The VAMC progressive discipline policy

provides for a range of penalties from reprimand to removal for sexual harassment. As such, Plaintiff's harassing conduct constitutes non-retaliatory grounds for his termination.

The Court finds that the VAMC had demonstrated five legitimate, non-retaliatory reasons for the adverse employment actions taken against Plaintiff. Thus, to withstand a motion for summary judgment, plaintiff bears the burden to prove by a preponderance of the evidence that the legitimate reasons offered were not the VAMC's true reasons, but were a pretext for retaliation. See Hitt v. Harsco Corp., 356 F.3d 920, 924 (8th cir. 2004).

2. Plaintiff Offers No Evidence that VAMC's Stated Reasons for His Removal Are Pretextual

To survive summary judgment, Plaintiff must demonstrate that there are genuine issues of material fact whether the VAMC's stated reasons are a pretext for retaliation. In his opposition to Defendant's Motion for Summary Judgment, Plaintiff argues that the VAMC's stated reasons for termination are false. See Pl. Mem. in Opp., p.1. He argues that his supervisors conspired against him and forced Schoonover into making false accusations. See id., p. 2; 4.

Plaintiff's arguments are unavailing and fail to raise an issue of fact whether VAMC acted for retaliatory reasons. The facts show that VAMC conducted a thorough investigation of Schoonover's harassment claim. The AIB, compromised of three

impartial members and a technical adviser, sat as a fact finding board and heard sworn testimony and received evidence. After reviewing all the evidence, the AIB made a formal finding that Plaintiff had harassed Schoonover. Plaintiff, beyond mere allegations that the AIB was unfair and partial, offered no evidence that the AIB discriminated against him or that the AIB investigation and findings were a pretext for retaliation. Moreover, the question whether VAMC correctly concluded that Plaintiff had exhibited harassing conduct is immaterial because VAMC acted reasonably and in good faith on the AIB's investigation and recommendation. See Euerle-Wehle v. United Parcel Service181 F.3d 898,900 (8th Cir. 1999); Texas Dep't of Community affairs v. Burdine, 450 U.S. 248 (1981) (a court need not determine that the defendant in good faith believed the asserted reason). Plaintiff has not demonstrated an issue of fact whether the VAMC improperly terminated Plaintiff because of his harassing conduct as a pretext for retaliation.

Nor has Plaintiff provided evidence that VAMC's four other proffered reasons for termination were pretextual or designed to disguise an illegal retaliatory motive. The VAMC has offered clear-cut, legitimate, non retaliatory reasons for terminating Plaintiff, including that he refused to obey a direct order to attend the AIB meeting after being warned that such refusal would result in discharge. Plaintiff has offered no evidence that the order he refused was given for any other reason than VAMC's legitimate interest in resolving internal complaints through the use of the AIB. Neither has Plaintiff presented evidence

that the VAMC treated other employees differently. See Harvey v. Anheuser-Busch, Inc., 38 F.3d 968,972-73 (9th Cir. 1994) (a common way of proving pretext is to show that similarly situated employees were more favorably treated). In short, Plaintiff has offered no evidence that the VAMC's stated reasons for his termination were pretextual, and his claim should be dismissed. See Putnam v. Unity Health System, 348 F.3d 732, 737 (8th Cir. 2003) (dismissing claim Title VII retaliation claim because Plaintiff failed to show pretext) (citing Hunt v. Neb. Pub. Power Dist., 282 F.3d 1028 (8th Cir. 2002).

In sum, even if the Court were to decide that Plaintiff has established a prima facie case of retaliation, his claim none the less fails as a matter of law. The VAMC has offered legitimate, non-retaliatory reasons for his termination, and Plaintiff has failed to establish that those reasons are pretext for a retaliatory motive. Plaintiff's retaliation claim should be dismissed.

III. Recommendation

Based on the files, records and proceedings herein, it is **HEREBY RECOMMENDED** that Defendant's Motion for Summary Judgment [# 25] be **GRANTED**.

Dated October 12, 2005 *s/Franklin L. Noel*

FRANKLIN L. NOEL

United States Magistrate Judge

Pursuant to the Local Rules, any party may object

to this Report and Recommendation by filing with the Clerk of Court and serving on all parties, on or before **October 31, 2005**, written objections which specifically identify the portions of the proposed findings or recommendations to which objection is being made, and a brief in support thereof. A party may respond to the objecting party's brief within ten days after service thereof. All briefs filed under the rules shall be limited to ten pages. A judge shall make a de novo determination of those portions to which objection is made.

Unless the parties are prepared to stipulate that the District Court is not required by 28 U.S.C. () 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendation, the party making the objections shall timely order and cause to be filed by **October 13, 2005** a complete transcript of the hearing.

This Report and Recommendation does not constitute an order or judgment of the District Court, and it is therefore, not appealable to the Circuit Court of Appeals.